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Jasmine Owens

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“HISTORIC” IN A BAD WAY: HOW THE TRIBAL LAW AND ORDER ACT CONTINUES THE AMERICAN TRADITION OF PROVIDING INADEQUATE PROTECTION TO AMERICAN INDIAN AND ALASKA NATIVE RAPE VICTIMS

Jasmine Owens*

I. ONE OF THESE THINGS IS NOT LIKE THE OTHERS

Four different men, Earl Pratt of Massachusetts, Wendell Lee Strickland of Arkansas, Ronnie Tom of Washington, and Tommy Lee Johnson of Texas, committed heinous crimes against children.¹ Each man raped a seven-year-old child in his respective state, and each was convicted and sentenced for his crime.² Despite general disdain for egregious crimes such as rape (whether of man, woman, or child), our justice system treats one of these men very differently from the rest. Pratt received a twenty-five-to-thirty-year sentence in Massachusetts,³ Johnson received twenty years in Texas,⁴ and Strickland received an eighteen-year sentence in

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¹ See *Strickland v. State*, No. CACR09-1286, 2010 WL 3566725 (Ark. Ct. App. Sept. 15, 2010); Kerry Drennan, *Court Convicts Repeat Drunken Driver, Sentences Rapist*, LUBBOCK AVALANCHE-J., Feb. 4, 2003, at A8; Michael Riley, *Promises, Justice Broken: A Dysfunctional System Lets Serious Reservation Crimes Go Unpunished and Puts Indians at Risk*, DENVER POST, Nov. 11, 2007, at 1A, available at http://www.denverpost.com/ci_7429560; *Man Sentenced for Raping 7-Year-Old: Girl Raped in 2006*, BOS. CHANNEL (July 22, 2009), <http://www.thebostonchannel.com/r/20141357/detail.html>.

² See sources cited *supra* note 1.

³ *Man Sentenced for Raping 7-Year-Old: Girl Raped in 2006*, *supra* note 1.

⁴ Drennan, *supra* note 1.

Arkansas.⁵ But Ronnie Tom served less than two years in a Colville Indian jail in the state of Washington because the Assistant United States Attorney in Spokane, Washington, declined to prosecute him, and federal laws prohibited the tribe from exacting a greater sentence.⁶

On a winter night in 2003, Ronnie Tom attempted to rape his live-in girlfriend's twelve-year-old sister.⁷ The girl managed to escape Tom's attack, but he redirected his assault to his girlfriend's seven-year-old daughter.⁸ Unfortunately, Tom succeeded in his vicious crime.⁹ Although an "expert forensics interviewer found the [seven-year-old's] testimony recounting the rape clear and credible," Tom was never charged with a felony.¹⁰ Tom is now living with his girlfriend and their young daughter,¹¹ despite a sexual-predator profile warning that Tom "should never be allowed to be alone with children, including his own, or live 'near places designed for children, such as schools, playgrounds (or) swimming pools.'"¹²

Why is it that Tom is home with his child, free to offend again, while others who committed similar crimes have been locked away for decades? Tom was not proven to be less culpable for his crime than his fellow offenders; there was no determination of insufficient evidence, nor was there any prosecutorial or police misconduct causing the case to be dismissed on a technicality. The differences between Tom and the other convicted child rapists are race and location. Because Tom is a Colville Indian¹³ who committed his crime on the Colville Indian reservation in

⁵ *Strickland*, 2010 WL 3566725, at *1.

⁶ Riley, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ This is particularly disturbing considering that "[s]ex offenders who commit acts of sexual violence against children have one of the highest rates of recidivism among all criminals" Krista L. Blaisdell, Note, *Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders*, 43 VAL. U. L. REV. 1155, 1192 (2009) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDER STATISTICS, SUMMARY FINDINGS).

¹² Riley, *supra* note 1.

¹³ Scholars use varied terms to refer to the United States' indigenous people. Legal scholarship often refers to "Indians" while other fields use the term "Native Americans." Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 455 n.2 (2005); see also STEPHEN CORNELL, *THE RETURN OF THE NATIVE AMERICAN INDIAN POLITICAL RESURGENCE* (1988). This Article will use the terms interchangeably.

eastern Washington, his case falls under federal jurisdiction.¹⁴ In Tom’s case the Assistant United States Attorney (located 150 miles away in Spokane, Washington) declined to prosecute, as they do in 65% of cases coming from Indian Country.¹⁵ The Colville Tribal Court was constrained by federal legislation capping sentences delivered by tribal courts to one year of incarceration per crime, a \$5,000 fine, or both.¹⁶ The tribe charged and convicted Tom for his crime and a separate incident involving Tom’s girlfriend’s twelve-year-old sister, resulting in less than two years of incarceration in tribal jail, the maximum penalty the tribe could impose.¹⁷

Unfortunately, the story of Ronnie Tom is an all-too-common reality for American Indian and Alaska Native people living in the United States’ domestic dependent nations (Indian Country). American Indian and Alaska Native people suffer from a disproportionately high rate of rape and sexual assault.¹⁸

¹⁴ See 18 U.S.C. § 1153(a) (2006) (giving the federal government exclusive jurisdiction over “[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . , an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country”). Note that the statute was amended in 1986, substituting “a felony under chapter 109A” for “rape, involuntary sodomy, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape.” Sexual Abuse Act of 1986, Pub. L. 99-654, § 3(a)(5), 100 Stat. 3660, 3663.

¹⁵ Riley, *supra* note 1.

¹⁶ See Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(7)(B) (2006). Originally limiting tribal courts to sentences of six months or fines of \$500, or both, the Indian Civil Rights Act (ICRA) was amended in 1986 to allow harsher penalties. See Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified as amended at 25 U.S.C. § 1302(7) (1994)) (“No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both” (footnote omitted)). Section 1302 was further amended in 2010 to allow punishment of up to three years or \$15,000 if the crime was punishable by more than one year were it prosecuted federally. 25 U.S.C. § 1302(a)(7) (Supp. IV 2011).

¹⁷ Riley, *supra* note 1. The almost-two-year sentence was possible because Tom was charged with misdemeanors stemming from the rape of the seven-year-old and another substantive crime involving a previous incident with the twelve-year-old. If Tom had been charged with one substantive crime, e.g., just charges stemming from the rape of the seven-year-old, the tribal court would have lacked authority to sentence Tom to more than one year incarceration, a \$5,000 fine, or both. See 25 U.S.C. § 1302(7) (1994); see also 18 U.S.C. § 1153 (2006) (precluding tribal courts from having jurisdiction over several enumerated crimes, including rape).

¹⁸ AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007).

Data gathered by the US Department of Justice indicates that Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general [M]ore than one in three [Native American and Alaska Native women] will be raped during their lifetime; the comparable figure for the USA as a whole is less than one in five.¹⁹

And while the assaults on American Indian and Alaska Native women are more violent than rapes suffered by the general population,²⁰ their rapes often go unprosecuted.²¹ A complex concurrent jurisdictional system and mixed messages about state, federal, and tribal responsibilities lessen accountability for all law enforcement agencies involved and result in a lack of justice for victims.

The latest enlargement of the jurisdictional system adds little more than another piece of legislation to the jurisdictional maze. On July 29, 2010, President Barack Obama signed the Tribal Law and Order Act of 2010 (the Act), the federal government's solution to the problems faced by American Indian and Alaska Native people.²² The legislation, lauded as "historic"²³ and "groundbreaking,"²⁴ does not do enough to protect women who have suffered rape and sexual violence. Despite the good press and excitement surrounding the new legislation, it fails to accomplish its stated purpose: "to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women"²⁵ The amendment does not recognize tribal authority to prosecute rape and other serious felonies and continues to restrict tribal courts' authority to adequately punish tribal members.

This Comment explains the problems with the current criminal justice system governing American Indian and Alaska Native people and offers a

¹⁹ *Id.* (footnotes omitted); see also Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A), 124 Stat. 2261, 2262 (recognizing that "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions").

²⁰ See AMNESTY INT'L, *supra* note 18, at 5 ("Fifty per cent of American Indian and Alaska Native women reported that they suffered physical injuries in addition to the rape; the comparable figure for women in general in the USA is 30 per cent." (footnote omitted)).

²¹ See *id.* at 9.

²² Gale Courey Toensing, *Obama Signs 'Historic' Tribal Law and Order Act*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 30, 2010), <http://indiancountrytodaymedianetwork.com/2010/07/30/obama-signs-%e2%80%98historic-%e2%80%99tribal-law-and-order-act-57502>. The Tribal Law and Order Act amended An Act to Protect Indian Arts and Crafts Through the Improvement of Applicable Criminal Proceeding, and for Other Purposes.

²³ *Id.*

²⁴ Larry Cox, *President Obama Signs Tribal Law and Order Act*, HUM. RTS. NOW—AMNESTY INT'L USA BLOG (Aug. 2, 2010), <http://blog.amnestyusa.org/women/president-obama-signs-tribal-law-and-order-act>.

²⁵ Tribal Law and Order Act of 2010, § 202(b)(4).

critique of and suggestions for the Tribal Law and Order Act. Specifically, this Comment argues that, to better protect Native American women from rape and sexual violence and to achieve the policy goal of healing past relations with American Indians and Alaska Natives, Congress should explicitly recognize concurrent jurisdiction between federal and tribal authorities to prosecute major crimes and remove restrictions on tribal authorities' ability to punish serious crimes such as rape.

This Comment starts with an overview of the problem of sexual violence in Indian Country to provide a clear picture of the unique problems facing American Indian and Alaska Native rape victims, and an understanding of why modifications to the new legislation are necessary. Part II.A explains the extent of the violence, II.B describes criminal jurisdiction over Indian Country, and 0 illustrates problems of implementation of the current system. This Comment then takes an in-depth look at the Tribal Law and Order Act; Part III.A describes how the Act changes tribal jurisdiction and Part III.B details the practical effect of those changes. Part IV considers the Tribal Law and Order Act's viability as a solution to the problems discussed in Part II. Finally, Part V suggests modifications that would make the legislation more effective in combating sexual violence against American Indian and Alaska Native women.

II. THE PROBLEM

Ronnie Tom's story is far from unusual. This Part details the sexual violence epidemic affecting Indian Country, the difficulty in determining which jurisdiction has authority to prosecute and investigate incidents of rape and sexual violence, and the practical problems arising out of the existing jurisdictional system that the Tribal Law and Order Act of 2010 seeks to redress.

A. RAPE AND SEXUAL VIOLENCE IN INDIAN COUNTRY

Rape and sexual violence in Indian Country have reached epidemic levels. Data gathered by the United States Department of Justice (DOJ) suggests that American Indian and Alaska Native women are over 2.5 times more likely to be raped or sexually assaulted than other women living in the United States.²⁶ A DOJ study looking at violence against all American women suggested that more than one in three American Indian and Alaska Native women will be raped during their lifetimes, compared to less than

²⁶ STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002, at 5 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

one in five women in the general population.²⁷ DOJ reports that at least 86% of the reported cases of rape or sexual assault against American Indian and Alaska Native women are committed by non-Native men.²⁸ A quarter of reported sexual violence towards these women is suffered at the hands of an intimate partner, while 41% of rapes are committed by strangers.²⁹ These numbers paint a dire picture. Even more distressing is that some anti-rape and human rights organizations think the numbers are a gross underestimation of the amount of rape and sexual violence plaguing Indian Country.³⁰

The sheer magnitude of the rape and sexual violence problem is itself shocking, but worse still is the brutality of the rapes suffered by American Indian and Alaska Native women.

Rape is always an act of violence, but there is evidence to suggest that sexual violence against American Indian and Alaska Native women involves a higher level of additional physical violence. Fifty per cent of American Indian and Alaska Native women reported that they suffered physical injuries in addition to the rape; the comparable figure for women in general in the USA is 30 per cent.³¹

In addition, the identity of those who rape American Indian and Alaska Native women makes the already brutal act take on tragic significance. While the majority of rapes in the United States are intraracial (white women are mostly raped by white men, black women are mostly raped by black men, etc.),³² rapes of American Indians and Alaska Natives are typically committed by non-Native outsiders.³³ Some have interpreted the rapes as a continuation of America's colonizing relationship with Native American and Alaska Native people.³⁴

²⁷ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000) (reporting the figure as 34.1%).

²⁸ AMNESTY INT'L, *supra* note 18, at 4.

²⁹ PERRY, *supra* note 26, at 8; *see also* AMNESTY INT'L, *supra* note 18, at 6 (noting the extent of sexual violence at the hands of male acquaintances, boyfriends, or husbands and highlighting the problems women face with law enforcement officials who do not recognize sexual violence between intimate partners as a crime).

³⁰ *See, e.g.*, AMNESTY INT'L, *supra* note 18, at 2 ("Amnesty International's interviews with survivors, activists and support workers across the USA suggest that available statistics greatly underestimate the severity of the problem.").

³¹ AMNESTY INT'L, *supra* note 18, at 5 (citing Ronet Bachman, The Epidemiology of Rape and Sexual Assaults Against American Indian Women: An Analysis of NCVS Data, Presentation to Federal and Tribal Working Group on Sexual Assault Against Native American Women (Sept. 29, 2003), *referenced in* Deer, *supra* note 13, at 457).

³² Deer, *supra* note 13, at 457.

³³ *See supra* text accompanying note 28.

³⁴ Deer, *supra* note 13, at 459 ("[W]hen speaking with Native American women who have survived rape, it is often difficult for them to separate the more immediate experience

American Indian and Alaska Native women are more likely to be raped and brutalized during their rapes, and they arguably suffer additional mental anguish stemming from the historical significance of the ongoing rape and colonization of their tribes. Additionally, the sexual assault and rape of American Indian and Alaska Native women is much more likely to be ignored.³⁵ As President Obama stated at a conference with tribal leaders, "[t]he shocking and contemptible fact that one in three Native American women will be raped in their lifetimes is an assault on our national conscience that we can no longer ignore."³⁶

B. THE JURISDICTIONAL MAZE

Despite the president's statement, a complicated jurisdictional maze of federal legislation and the Supreme Court's jurisprudence frustrates fulfillment of that promise. The mix of federal, state, and tribal authorities responsible for policing and prosecuting incidents occurring in Indian Country and by or against American Indian and Alaska Native residents has been described by Congress as a "complicated jurisdictional scheme."³⁷ Indian reservations are considered domestic dependent nations for which the United States "has distinct legal, treaty, and trust obligations to provide for the public safety."³⁸ The federal government attempted to fulfill these obligations by asserting more control over criminal investigations and

of their assault from the larger experience that their people have experienced through forced removal, displacement, and destruction." Consider a passage from the diary of one of Christopher Columbus's friends, writing about an encounter with an indigenous woman on Columbus's second voyage to the Americas, for an example of the almost immediate initiation of the rape of Native American women by European men upon their arrival in the Americas:

When I was in the boat, I captured a very beautiful Carib woman [H]aving brought her into my cabin, and she being naked as is their custom, I conceived desire to take my pleasure. I wanted to put my desire to execution, but she was unwilling for me to do so, and treated me with her nails in such wise that I would have preferred never to have begun. But seeing this . . . I took a rope-end and thrashed her well, following which she produced such screaming and wailing as would cause you not to believe your ears. Finally we reached an agreement such that, I can tell you, she seemed to have been raised in a veritable school of harlots

Deer, *supra* note 13, at 458 (citing Michele de Cuneo, *Letter to a Friend*, in *THE DISCOVERY OF AMERICA AND OTHER MYTHS* 129 (Thomas Christensen & Carol Christensen eds., 1992)).

³⁵ See *infra* Parts II.B, II.C.

³⁶ President Barack Obama, Remarks by the President During the Opening of the Tribal Nations Conference & Interactive Discussion with Tribal Leaders (Nov. 5, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-during-opening-tribal-nations-conference-interactive-discussion-w>).

³⁷ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2261, 2262.

³⁸ § 202(a)(1), 124 Stat. at 2262.

prosecutions involving American Indian and Alaska Native people.³⁹ However, three pieces of legislation and one Supreme Court decision have curtailed tribal governments' power to investigate and prosecute criminal offenses: (1) the Major Crimes Act of 1885,⁴⁰ (2) Public Law 280 of 1953,⁴¹ (3) the Indian Civil Rights Act of 1968,⁴² and (4) *Oliphant v. Suquamish Indian Tribe* in 1978.⁴³

The Major Crimes Act of 1885 marked the first indication that the federal government possessed any authority over crimes occurring in Indian Country.⁴⁴ The Act authorized federal jurisdiction over "major crimes." These major crimes now include murder, manslaughter, kidnapping, maiming, assault with intent to commit murder, assault, felony child abuse or neglect, arson, burglary, robbery, and rape, committed by an Indian against the "person or property of another Indian or other person."⁴⁵

The Major Crimes Act is ambiguous on two points. First, it is unclear whether the Act provides exclusive jurisdiction to the federal government over the enumerated crimes, or if it provides for concurrent jurisdiction with tribal courts.⁴⁶ Second, the definitions of the enumerated crimes are ambiguous, resulting in substantial litigation aimed at defining them.⁴⁷ These ambiguities are confusing to both tribal and federal authorities and, more importantly, to victims seeking assistance.⁴⁸

The Major Crimes Act does not explicitly grant exclusive jurisdiction to the federal government for the enumerated crimes at the expense of the

³⁹ See Deer, *supra* note 13, at 460.

⁴⁰ Ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2006)).

⁴¹ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at § 1162, 28 U.S.C. § 1360 (2006)).

⁴² Pub. L. No. 90-284, §§ 201-203, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (2006 & Supp. IV 2011)).

⁴³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). For a general discussion of how the four laws interact, see Deer, *supra* note 13, at 460-63.

⁴⁴ Deer, *supra* note 13, at 460.

⁴⁵ Major Crimes Act of 1885, ch. 341, § 9.

⁴⁶ See, e.g., *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979) (holding that the Major Crimes Act grants federal courts jurisdiction over the enumerated crimes); *United States v. John*, 587 F.2d 683 (5th Cir. 1979) (same); *United States v. Tyndall*, 400 F. Supp. 949 (D. Neb. 1975) (same).

⁴⁷ See *DeMarrias v. United States*, 487 F.2d 19 (8th Cir. 1973) (holding that assault with a dangerous weapon was triable under the Major Crimes Act); *United States v. Davis*, 429 F.2d 552 (8th Cir. 1970) (clarifying that the Major Crimes Act includes the crime of assault with a dangerous weapon, but not the lesser included offense of simple assault and battery); *Tyndall*, 400 F. Supp. 949 (holding that assault with intent to inflict great bodily injury is not a crime under the Major Crimes Act); *United States v. Davis*, 148 F. Supp. 478 (D.N.D. 1957) (holding that carnal knowledge did not constitute rape under the Major Crimes Act).

⁴⁸ See AMNESTY INT'L, *supra* note 18, at 8.

tribal court's own jurisdiction.⁴⁹ However, courts disagree on whether jurisdiction over major crimes is exclusively federal or exists concurrently with tribal sovereigns.⁵⁰ Some courts interpret the statute to exclude tribal jurisdiction over American Indian and Alaska Native offenders,⁵¹ while others have held that tribal courts retain concurrent jurisdiction if the crime is committed in Indian Country by an American Indian or Alaska Native perpetrator.⁵²

For example, Dan Martin Sam, a member of the Navajo tribe, was convicted of raping an American Indian on the Navajo reservation; the federal district court in New Mexico sentenced him to twenty years imprisonment.⁵³ Sam appealed to the Tenth Circuit, arguing that a language barrier between Sam and his court-appointed attorney interfered with his Sixth Amendment right to the effective assistance of counsel.⁵⁴ Sam sought, among other relief, to have the case transferred to Navajo courts.⁵⁵ However, the Tenth Circuit held that under the Major Crimes Act, prosecution of an Indian for rape of another Indian within Indian Country was a case beyond the jurisdiction of a tribal court.⁵⁶

In contrast to *Sam*, the Ninth Circuit recognized concurrent jurisdiction in *Wetsit v. Stafne*, when it held that a tribal court had the authority to try Georgia Leigh Wetsit for stabbing her husband despite Wetsit's earlier acquittal in a federal district court case arising from the same incident.⁵⁷ The court found that tribes retain inherent sovereignty to prosecute Indians who commit crimes enumerated by the Major Crimes Act.⁵⁸

⁴⁹ See also *Deer*, *supra* note 13, at 460.

⁵⁰ See *Felicia v. United States*, 495 F.2d 353, 354 (8th Cir. 1974) (implying that the Major Crimes Act stripped tribal courts of jurisdiction of crimes enumerated by the Act); *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967) (similar). But see *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (recognizing tribes' concurrent jurisdiction with the federal government to prosecute crimes enumerated in the Major Crimes Act). In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court recognized that there is a question of whether the Major Crimes Act granted the federal government exclusive jurisdiction over enumerated crimes committed by Indians, but declined to rule on this issue. 435 U.S. 191, 203 n.14 (1978) ("We have no reason to decide today whether jurisdiction under the Major Crimes Act is exclusive.").

⁵¹ See *Felicia*, 495 F.2d at 354; *Sam*, 385 F.2d at 214.

⁵² See *Wetsit*, 44 F.3d at 825.

⁵³ *Sam*, 385 F.2d at 214–15.

⁵⁴ *Id.* at 214.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Wetsit*, 44 F.3d at 825.

⁵⁸ *Id.* That the tribes retain jurisdiction over crimes within the Major Crimes Act is the conclusion already reached by distinguished authorities on the subject. See, e.g., WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 135 (2d ed. 1988) ("[T]he great majority

Besides the unsettled issue of whether tribes share concurrent jurisdiction with the federal government over the enumerated crimes, there has been some confusion as to what those crimes are. For example, in the limited arena of rape, confusion existed as to whether “rape” as enumerated in the Major Crimes Act included statutory rape⁵⁹ and carnal knowledge.⁶⁰ Through several judicial opinions, “rape” was construed as including only common law rape, not statutory rape or carnal knowledge.⁶¹ Courts reasoned that Congress adopted a state law definition of rape by subjecting an Indian who commits rape to the same laws and penalties as any other person committing the offense within the exclusive jurisdiction of the United States; therefore Congress intended to include only acts that constituted common law rape, not carnal knowledge or statutory rape (which are not crimes under federal law).⁶² The same confusion as to what constitutes a “major crime” under the Act has been litigated regarding assault,⁶³ battery,⁶⁴ drug offenses,⁶⁵ larceny,⁶⁶ and attempted crimes.⁶⁷

The Major Crimes Act introduced great uncertainty as to the proper place to prosecute crimes committed in Indian Country by American Indian

of tribes have for many years exercised jurisdiction over the crime of theft, which duplicates larceny, a crime rather surprisingly included in the original Major Crimes Act.”).

⁵⁹ Statutory rape is defined as “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.” BLACK’S LAW DICTIONARY 1288 (8th ed. 1999).

⁶⁰ Carnal knowledge is defined as “[s]exual intercourse, esp. with an underage female.” BLACK’S LAW DICTIONARY 226 (8th ed. 1999).

⁶¹ See *Pocatello v. United States*, 394 F.2d 115 (9th Cir. 1968); *United States v. Rider*, 282 F.2d 476 (9th Cir. 1960); *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953); *Quagon v. Biddle*, 5 F.2d 608 (8th Cir. 1925); *United States v. Red Bear*, 250 F. Supp. 633 (D.S.D. 1966); *Petition of McCord*, 151 F. Supp. 132 (D. Alaska 1957).

⁶² *Rider*, 282 F.2d at 478–79; see also *id.* at 480 (holding that “‘rape’ as used in Section 1153 [does] not encompass the crime of ‘statutory rape’”).

⁶³ See *United States v. Tyndall*, 400 F. Supp. 949 (D. Neb. 1975) (examining whether assault with intent to inflict great bodily injury constituted a crime under the Major Crimes Act).

⁶⁴ See *DeMarrias v. United States*, 487 F.2d 19 (8th Cir. 1973) (determining that the federal courts had jurisdiction over the felony offense of assault with a dangerous weapon, but lacked jurisdiction to try simple assault and battery).

⁶⁵ See *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983) (examining whether the sale of drugs in Indian Country was punishable under federal jurisdiction despite its omission from the list of a major crimes).

⁶⁶ See *United States v. Gilbert*, 378 F. Supp. 82 (D.S.D. 1974) (holding that larceny falls within federal jurisdiction regardless of the monetary value of the good).

⁶⁷ See *United States v. Joe*, 452 F.2d 653 (10th Cir. 1971) (holding that federal jurisdiction applies only to attempts to commit crimes specifically enumerated by the Major Crimes Act).

and Alaska Native people and the precise definition of what crimes were covered.⁶⁸

The second piece of legislation to reassign jurisdiction was Public Law 280.⁶⁹ Enacted in 1953, Public Law 280 further infringes on tribal authority.⁷⁰ Public Law 280 transferred federal criminal jurisdiction, obtained by virtue of the Major Crimes Act discussed above, over Indian Country in California, Wisconsin, Minnesota, Nebraska, Oregon, and Alaska from the federal government to state governments.⁷¹ Neither the affected states (“public law states”) nor the tribes consented to the new arrangement, which forced public law states to assume the additional responsibility without receiving any additional resources from the federal government.⁷²

Finally, the Indian Civil Rights Act of 1968 (ICRA) is the third piece of federal legislation to constrain tribal jurisdiction. The ICRA required tribal governments to observe the Bill of Rights to protect tribal members’ constitutional rights. For tribal courts, the ICRA meant providing procedural and substantive due process, trial by jury, and other constitutional rights guaranteed in American courts.⁷³ In addition to imposing the Bill of Rights on tribal governments, the ICRA limited the punishment that a tribe may impose on criminal defendants.⁷⁴ Originally, the ICRA limited punishment to a maximum of six months of incarceration or a fine of \$500, but it was amended in 1986 to increase the maximum sentence to one year of incarceration, a \$5,000 fine, or both.⁷⁵

The ICRA is controversial because of the numerous ways in which it restricts tribal sovereignty.⁷⁶ The Act goes beyond paternalism, as it

⁶⁸ See AMNESTY INT’L, *supra* note 18, at 8 (“The US federal government has created a complex interrelation between [tribal, state, and federal] jurisdictions that undermines equality before the law and often allows perpetrators to evade justice.”).

⁶⁹ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2006)).

⁷⁰ Deer, *supra* note 13, at 461.

⁷¹ See 18 U.S.C. § 1162(a) (“Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory . . .”).

⁷² Deer, *supra* note 13, at 460–61.

⁷³ Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302 (2006 & Supp. IV 2011)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Deer, *supra* note 13, at 461.

disrespects tribal sovereignty in a very blatant way: “[t]he message sent by this law is that, in practice, tribal justice systems are only equipped to handle less serious crimes. As a result of this limitation on their custodial sentencing powers, some tribal courts are less likely to prosecute serious crimes, such as sexual violence.”⁷⁷ When combined with Public Law 280 and the Major Crimes Act, the ICRA is a practical divestiture of all tribal jurisdiction over major crimes committed by American Indians or Alaska Natives in Indian Country.⁷⁸

The Supreme Court recognized the federal government’s de facto exclusive jurisdiction over major crimes in *Oliphant v. Suquamish*, when it noted that “the issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of \$500.”⁷⁹ As seen in the case of Ronnie Tom,⁸⁰ even if a federal prosecutor declines to prosecute a major crime and a tribal court seeks to exercise its concurrent jurisdiction by prosecuting that tribal member for the crime, the ICRA constrains the tribal court’s power to punish the tribal member.

Oliphant also dealt a blow to tribal criminal jurisdiction over defendants who are not American Indian and not tribal members. Mark David Oliphant’s case came to the Supreme Court through a writ of habeas corpus.⁸¹ The tribal court of the Suquamish Indian reservation in Washington convicted Oliphant of assaulting a tribal officer and resisting arrest.⁸² Oliphant argued that, as a non-Indian permanent resident of the reservation, he was not subject to tribal criminal jurisdiction. The Supreme Court, relying on the ICRA, agreed with Oliphant and stripped tribal courts of the right to try non-Native offenders who violate tribal or federal law in Indian Country.⁸³

⁷⁷ AMNESTY INT’L, *supra* note 18, at 29.

⁷⁸ Deer, *supra* note 13, at 461.

⁷⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n.14 (1978).

⁸⁰ Riley, *supra* note 1.

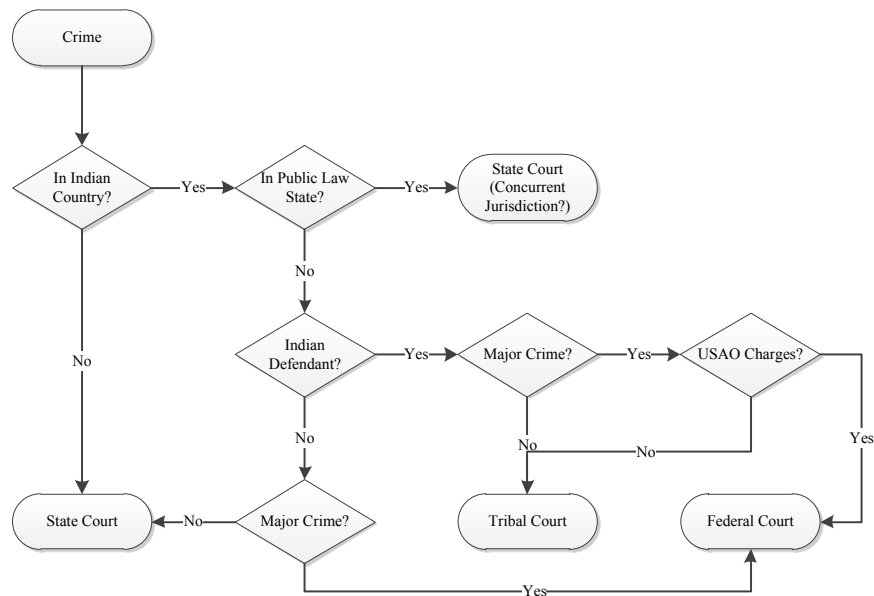
⁸¹ *Oliphant*, 435 U.S. at 194.

⁸² *See id.*

⁸³ *Id.* at 195 n.6. It should be noted that although tribal courts have no criminal jurisdiction over non-American Indian non-tribal members, tribal courts do have authority over American Indians on their reservation who are not members of their tribe. This includes American Indians from a different tribe, and American Indians from the tribe who are not enrolled as official members. *See* U.S. v. Lara, 541 U.S. 193, 210 (2004) (upholding Congress’s amendment to the ICRA, 25 U.S.C. § 1301(2) (2006), known as the “Duro fix,” which authorized criminal jurisdiction over “all Indians”). *See generally* Duro v. Reina, 495 U.S. 676 (1990) (holding that tribal authority did not extend to American Indians not

The prevalence of non-Indian and American Indian and Alaska Native crime occurring in Indian Country has long been recognized as a public safety concern.⁸⁴ Legislation and common law suggest that the federal government and the Supreme Court consider federal or state law as the most appropriate deterrent to these crimes, federal or state law enforcement as the best option for policing the reservations, and federal or state courts as the most appropriate forum to prosecute criminals terrorizing Indian Country.⁸⁵ However, as Figure 1 illustrates, a criminal jurisdictional system dependent on so many moving parts, such as the race of the perpetrator and the location and severity of the crime, is unnecessarily complex.

Figure 1
*The Jurisdictional Maze*⁸⁶



belonging to the tribe), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892–93 (codified at 25 U.S.C. § 1301(2) (2006)).

⁸⁴ *Oliphant*, 435 U.S. at 212 (“[W]e are not unaware of the prevalence of non-Indian crime on today’s reservations . . .”).

⁸⁵ See generally 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1301–1303 (2006 & Supp. IV 2011); 28 U.S.C. § 1360 (2006); *Oliphant*, 435 U.S. 191.

⁸⁶ This flowchart illustrates how the Major Crimes Act, Public Law 280, the Indian Civil Rights Act, *Oliphant v. Suquamish*, and the “Duro fix” combine to determine jurisdiction over crimes occurring inside or outside Indian Country, and committed by or against American Indian and Alaska Native residents of Indian Country.

Section C explains why the federal government and Supreme Court are misguided and illustrates some of the practical problems arising from the confused system existing before the Tribal Law and Order Act. Section C shows how, when so many police agencies, prosecutors, and courts are responsible for ensuring safety and order and facilitating victims' search for justice, there is often no justice for American Indian and Alaska Native victims of rape and sexual assault.

C. PRACTICAL PROBLEMS ARISING FROM THE PRE-TRIBAL LAW AND ORDER ACT SYSTEM: AN EXPLANATION OF WHY THERE IS NO JUSTICE

The main barriers to justice for American Indian and Alaska Native women rape victims are inadequate policing, impediments to prosecution, and jurisdictional confusion.⁸⁷ American Indian and Alaska Native women often encounter a police force not adequately trained to deal with sexual assault and rape crimes; they face delays and failed law enforcement responses, inappropriate police responses to allegations, and difficulty obtaining forensics examinations such as rape kits.⁸⁸

These problems stem in part from the jurisdictional confusion created by federal legislation and the *Oliphant* decision.⁸⁹ After a rape, an American Indian or Alaska Native woman first has to contact tribal authorities, who then must figure out which agency is responsible for the investigation, contact that agency, and wait for the agency to travel to Indian Country to conduct the investigation.⁹⁰ This is a process that can take months because of the lack of a dedicated force of either federal or state police to investigate crimes in Indian Country.⁹¹ "Investigative resources are spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave . . . sexual assault victims vulnerable or suspects free to commit other crimes"⁹²

Inadequate investigation undoubtedly leads to difficulties in prosecution. If an American Indian or Alaska Native woman's case gets to the prosecution stage, there are numerous obstacles affecting the possible

⁸⁷ See generally AMNESTY INT'L, *supra* note 18.

⁸⁸ *Id.* at 41–46.

⁸⁹ See discussion *supra* Part II.B.

⁹⁰ Riley, *supra* note 1.

⁹¹ See *id.*

⁹² *Id.*

prosecuting bodies. Tribal, state, and federal courts face their own unique problems in prosecuting cases of rape that occurred in Indian Country.

In addition, tribal courts are constrained by the ICRA’s custodial incarceration limits.⁹³ Tribal courts also suffer from a lack of federal funding, out-of-date tribal codes,⁹⁴ and a lack of resources to revamp those codes.⁹⁵ Additionally, an expectation that federal prosecutors will pursue all serious matters discourages tribes from making the necessary investments to improve their courts.⁹⁶ These issues make prosecuting perpetrators of rape, sexual assault, and all other major crimes difficult for tribal courts.

On the federal level, the largest impediment to a victim’s justice is a federal prosecutor exercising his or her discretion to decline to prosecute a case.⁹⁷ Former United States Attorney Margaret Chiara admitted that some federal prosecutors actively avoid prosecuting rape cases from Indian Country: “I’ve had [Assistant U.S. Attorneys] look right at me and say, ‘I did not sign up for this’ . . . they want to do big drug cases, white-collar crime and conspiracy.”⁹⁸ Chiara notes that most federal judges have similar feelings: “They will look at these Indian Country cases and say, ‘What is this doing here? I could have stayed in state court if I wanted this stuff.’”⁹⁹

Other prosecutors fault poor investigation and lack of forensic evidence for the large number of American Indian and Alaska Native rape cases that prosecutors decline to prosecute each year.¹⁰⁰ James A. McDevitt, United States Attorney for the Eastern District of Washington,¹⁰¹ explained, “We have the obligation before proceeding to a grand jury to make sure we have a prosecutable case. . . . We’re not in the business of

⁹³ Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302 (2006 & Supp. IV 2011)) (originally limiting punishment to one year of incarceration, a \$5,000 fine, or both; now limiting punishment to three years of incarceration, a \$5,000 fine, or both); *see also* discussion of ICRA *supra* Part II.B.

⁹⁴ For example, the statute governing the Standing Rock reservation in North and South Dakota does not include digital penetration as a form of rape. AMNESTY INT’L, *supra* note 18, at 64.

⁹⁵ *Id.* at 63.

⁹⁶ *Id.*

⁹⁷ *See* Riley, *supra* note 1.

⁹⁸ *Bill Moyers Journal* (PBS television broadcast Nov. 14, 2008) [hereinafter *Bill Moyers Journal*] (transcript available at <http://www.pbs.org/moyers/journal/11142008/transcript2.html>).

⁹⁹ Riley, *supra* note 1.

¹⁰⁰ *Bill Moyers Journal*, *supra* note 98.

¹⁰¹ The case of Ronnie Tom falls in this district; however, McDevitt could only comment generally, and not on the declination of Tom’s case. Riley, *supra* note 1.

taking cases we're going to lose."¹⁰² Whatever the reason, federal prosecutors decline to prosecute rape cases from Indian Country 65% of the time.¹⁰³ Because of federal jurisdiction requirements, rape is not a crime generally prosecuted in federal courts.¹⁰⁴ Therefore, comparisons between the rate of declination to prosecute for rapes from Indian Country and rapes from the general population are not easily made. However, in 2000, federal prosecutors declined to prosecute about 26% of the cases filed in federal court,¹⁰⁵ a figure substantially lower than the 65% rate of declination to prosecute rapes from Indian Country.

Barriers to justice similar to those present in federal and tribal courts exist in state court as well. The most prominent difficulties in prosecutions are discrimination and cultural barriers.¹⁰⁶ The distance of the court from remote Indian Country locations can also be a burden for an American Indian or Alaska Native woman seeking justice for her rape.¹⁰⁷

Another problem that faces all jurisdictions is one of bringing perpetrators in to face prosecution. Perpetrators sometimes escape prosecution by fleeing to a different jurisdiction.¹⁰⁸ Because jurisdictions are rigidly separated into state, federal, or tribal land, perpetrators can easily cross borders to escape prosecution. Perpetrators are able to take advantage of the jurisdictional lines unless federal, state, and tribal agencies enter into extradition agreements.¹⁰⁹ For example, in non-public law states a state police officer has no jurisdiction to arrest a tribal member on tribal lands for a crime committed outside of Indian Country.¹¹⁰ This means that a member of the Navajo reservation can commit a crime in Albuquerque and return to the reservation to be safe from New Mexico state police, unless there is an extradition arrangement between the tribe and the state police.

Once in state or federal court, American Indian and Alaska Native women face still more difficulty securing justice. When their cases are tried in federal or state courts, American Indian and Alaska Native women often face language and cultural barriers, discrimination, and inadequate jury

¹⁰² *Id.* (internal quotation marks omitted).

¹⁰³ *Id.*

¹⁰⁴ Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.2 (1986).

¹⁰⁵ Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1445 (2004).

¹⁰⁶ AMNESTY INT'L, *supra* note 18, at 69–70.

¹⁰⁷ *Id.* at 69. For example, in the public law state of Alaska, "cases are prosecuted in state courts far away from the villages," *id.*, often involving an expensive plane ride.

¹⁰⁸ *Id.* at 39.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

representation.¹¹¹ Often, there is also a hardship in traveling long distances to secure a rape kit or communicate with a prosecutor in preparation for trial.¹¹²

The sheer number of sexual assaults and rapes, combined with jurisdictional confusion, inadequate policing, and barriers to prosecution, put American Indian and Alaska Native women in a vulnerable position. Their position prompted President Obama’s assertion that the current situation amounts to an “assault on our national conscience” and “an affront to our shared humanity.”¹¹³ President Obama stressed that “it is something that we cannot allow to continue.”¹¹⁴

American Indian and Alaska Native women are raped more often and more violently than any other group of women in the United States.¹¹⁵ Historically, the rape of American Indian and Alaska Native women was used as a tool of war.¹¹⁶ Presently, these women continue to be raped by white men and strangers, a shocking phenomenon considering that the majority of rapes are intraracial.¹¹⁷ Despite the disproportionately high rape rate, American Indian and Alaska Native women face barriers to justice. Tribal courts have been stripped of their power to prosecute these crimes, and federal and state officials often drop the ball on investigation, follow through, and prosecution of rapes and sexual assaults in Indian Country.¹¹⁸ Furthermore, women whose cases do reach the prosecution stage are met with the burden of traveling long distances to participate in the trial, and face cultural and language barriers with prosecutors.¹¹⁹ With all of the problems facing American Indian and Alaska Native women, the need for an aggressive, proactive solution has been apparent for years. Part III discusses the Tribal Law and Order Act, and the Act’s attempt to remedy the problems outlined in Part II.

III. THE SOLUTION?

The Senate passed the Tribal Law and Order Act in June of 2010,¹²⁰ the House followed suit, and President Obama signed the Act into law on

¹¹¹ *Id.* at 69–70.

¹¹² *Id.* at 71.

¹¹³ Toensing, *supra* note 22.

¹¹⁴ *Id.* (quoting President Obama as he spoke about the rape and sexual violence crisis in Indian Country).

¹¹⁵ AMNESTY INT’L, *supra* note 18, at 2–4.

¹¹⁶ Deer, *supra* note 13, at 455.

¹¹⁷ AMNESTY INT’L, *supra* note 18, at 8.

¹¹⁸ Deer, *supra* note 13, at 457–60.

¹¹⁹ AMNESTY INT’L, *supra* note 18, at 39.

¹²⁰ Pub. L. No. 111-211, 124 Stat. 2261, 2261 (2010).

July 29, 2010, with much popular support.¹²¹ Most tribal governments and politicians applauded the Tribal Law and Order Act as “historic,”¹²² a “monumental change,”¹²³ and a “recognition of the tremendous criminal justice gap faced by Indian country citizens.”¹²⁴

The Act was celebrated as one that “will give American Indian nations more authority to fight crime on their lands.”¹²⁵ It has also been described as “a groundbreaking piece of bipartisan legislation that tackles the complex jurisdictional maze that allows violent crime against Native American and Alaska Native peoples to flourish.”¹²⁶ This Part will outline the major changes introduced by the Act in Section A, and then, in Section B, will look at the effect those changes will likely have on the lives of American Indian and Alaska Native women.

A. THE CHANGES

The Tribal Law and Order Act first acknowledges that “the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian Country.”¹²⁷ The Act seeks to rectify the outlined problems by clarifying the responsibilities of federal, state, tribal, and local governments; increasing coordination amongst agencies; empowering tribal governments; reducing the prevalence of violent crime in Indian Country; combating sexual and domestic violence; preventing drug trafficking and reducing the rate of alcohol abuse on reservations; and increasing and standardizing the collection of criminal data between federal, state, and tribal officials.¹²⁸

The Tribal Law and Order Act is organized into seven subtitles, each of which addresses one of its stated goals. Subtitle A addresses federal accountability and coordination; Subtitle B discusses state accountability and coordination for public law states; Subtitle C outlines provisions and steps for empowering tribal law enforcement agencies and governments; Subtitle D addresses tribal justice systems; Subtitle E references Indian Country crime data collection and information sharing; and finally Subtitle

¹²¹ Toensing, *supra* note 22.

¹²² *Id.*

¹²³ *Id.* (quoting Walter Lamar, citizen of the Blackfeet Nation of Montana and president and CEO of Lamar Associates, which offers consulting services in areas of law enforcement and security).

¹²⁴ *Id.* (quoting Lamar).

¹²⁵ *Id.*

¹²⁶ Cox, *supra* note 24.

¹²⁷ Tribal Law and Order Act, Pub. L. No. 111-211, § 202(a)(1), 124 Stat. 2261, 2262 (2010).

¹²⁸ § 202(a)(1)–(7).

F relates to domestic violence and sexual assault prosecution and prevention.¹²⁹ The changes to the current law effected by these subtitles are outlined below.

Subtitle A, dealing with federal accountability and coordination with other agencies, attempts to clarify the jurisdictional maze that exists between federal and tribal authorities in non-public law states by summarizing the jurisdictional system governing major crimes in Indian Country.¹³⁰ Subtitle A makes four major changes to the current system of federal jurisdiction over crimes in Indian Country. First, it requires the appointment of special prosecutors to assist in prosecuting federal offenses committed in Indian Country.¹³¹ The second major change requires the appointment of at least one Assistant United States Attorney to serve as a tribal liaison for districts that include Indian Country.¹³² The newly appointed tribal liaisons will be responsible for coordinating prosecutions, developing relationships between the federal government and tribal leaders, providing technical assistance and training to tribal justice officers, and conducting other activities deemed appropriate by the United States Attorney.¹³³ Third, Subtitle A requires the establishment of the Department of Tribal Justice to serve as a point of contact between tribal governments and the federal government for questions on DOJ policies and programs.¹³⁴ Lastly, Subtitle A establishes a new position, the Native American Issues Coordinator, in the DOJ Executive Office for United States Attorneys to coordinate prosecutions in Indian Country.¹³⁵

Subtitle B is relevant to public law states and amends Public Law 280 to allow tribes to request concurrent jurisdiction between federal and state courts¹³⁶ over major crimes. It also allows tribes to submit applications for three-way concurrent jurisdiction between federal, state, and tribal courts.¹³⁷ Subtitle B stipulates that all changes to jurisdiction achieved through Subtitle B must come “[a]t the request of an Indian tribe, and after consultation with and consent by the Attorney General.”¹³⁸ Further, Subtitle B encourages state, tribal, and local governments to cooperate

¹²⁹ §§ 201–266.

¹³⁰ §§ 211–214.

¹³¹ § 213(a)(1)(A).

¹³² § 213(b).

¹³³ § 213(b).

¹³⁴ § 214(a).

¹³⁵ § 214(b).

¹³⁶ Public Law 280 gave exclusive jurisdiction to state courts. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006).

¹³⁷ Tribal Law and Order Act, § 221.

¹³⁸ *Id.*

through “mutual aid, hot pursuit of suspects, and cross-deputization” agreements by offering federal assistance to the parties to such agreements.¹³⁹ Federal assistance is available to tribes and state agencies regardless of whether the tribe opts for concurrent federal jurisdiction, but some form of cooperative agreement with a state or local agency is required.¹⁴⁰

Subtitle C outlines provisions and steps for empowering tribal law enforcement agencies and tribal governments to assist federal agencies. It delineates an agreement between the federal government and tribes to set training requirements for tribal police officers.¹⁴¹ The goal is to set minimum training requirements and give trained individuals the status and authority of “Federal law enforcement officer[s].”¹⁴²

Subtitles D (Tribal Justice Systems) and E (Indian Country Crime Data Collection and Information Sharing) implement major procedural changes and establish community programs.¹⁴³ Subtitle D extends the federal budget to include programs for alcohol abuse, mental health services, and Indian education programs (including youth summer camps).¹⁴⁴ Subtitle D also funds legal representation in tribal courts, finances constructing and improving tribal jails, and encourages the appointment and use of probation officers.¹⁴⁵ Subtitle E sets up much-needed procedures to track crimes committed in Indian Country and aims to improve the recording of criminal histories of repeat offenders.¹⁴⁶ Currently, Indian Country crime data is blended with federal or state crime data as well as with the Bureau of Indian Affairs; this arrangement presents difficulties in studying problems, recognizing trends, and tracking progress.¹⁴⁷ The new system will track a perpetrator’s offenses in federal, state, and tribal jurisdictions and also mandates reports to be filed with the federal government that exclusively track crime in Indian Country.¹⁴⁸

Subtitle F deals specifically with prosecuting and preventing domestic violence and sexual assault. The subtitle creates procedures for prisoner release and reentry into Indian Country,¹⁴⁹ trains Indian Country law

¹³⁹ § 222.

¹⁴⁰ *Id.*

¹⁴¹ § 231(b)(1).

¹⁴² § 231(b)(1).

¹⁴³ §§ 241–247, 251–252.

¹⁴⁴ §§ 241–247.

¹⁴⁵ *Id.*

¹⁴⁶ §§ 251–252.

¹⁴⁷ *Bill Moyers Journal*, *supra* note 98.

¹⁴⁸ §§ 251–252.

¹⁴⁹ § 261.

enforcement to properly investigate domestic and sexual violence,¹⁵⁰ defines procedures for coordination of federal agencies,¹⁵¹ establishes a sexual assault protocol,¹⁵² and commits the Comptroller General of the United States to conduct a study of the capabilities of Indian Health Service facilities in remote Indian reservations and Alaska Native villages.¹⁵³

Finally, Subtitle G, the last of the Act, establishes the Indian Law Enforcement Foundation, sets out qualifications and compensation for those serving on the board of directors, and dedicates up to \$500,000 of federal funding to fund the new organization.¹⁵⁴ Most important for present purposes, the Act amends the ICRA by increasing the maximum custodial sentence that tribal courts can apply from one year of incarceration, a \$5,000 fine, or both to three years of incarceration, a fine up to \$15,000, or both.¹⁵⁵

The seven subtitles of the Tribal Law and Order Act make major changes to the current system. Section B discusses how changes instituted by the Tribal Law and Order Act may affect future American Indian and Alaska Native rape victims.

B. PRACTICAL EFFECT OF THE CHANGES

Some constructive provisions contained in the Tribal Law and Order Act deserve the overwhelming praise and recognition that accompanied the Act’s adoption. The attention to the problems faced by American Indian and Alaska Native rape victims and the public awareness that comes from a piece of national legislation have the potential to create serious change. The effort to train tribal law enforcement¹⁵⁶ and the implementation of summer and other educational programs for youth living in Indian Country¹⁵⁷ will greatly improve the quality of life for American Indian and

¹⁵⁰ § 262.

¹⁵¹ § 264.

¹⁵² § 265.

¹⁵³ § 266.

¹⁵⁴ § 231(c).

¹⁵⁵ § 234(a). This provision amends 25 U.S.C. § 1302 to say:

A tribal court may subject a defendant to a term of imprisonment greater than a year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year if prosecuted by the United States or any of the States.

25 U.S.C. § 1302 (2006 & Supp. IV 2011).

¹⁵⁶ Tribal Law and Order Act, § 241(f).

¹⁵⁷ Tribal Law and Order Act, § 241(a)(1).

Alaska Native communities. Finally, data sharing amongst agencies¹⁵⁸ and the increased training of tribal law enforcement (especially in the specialized area of rape and sexual assault investigations)¹⁵⁹ will make life safer for those living in American Indian and Alaska Native communities.

Practically, American Indian and Alaska Native women are most likely to be directly affected by three areas impacted by the legislation: prevention, policing, and prosecution. American Indian and Alaska Native women will notice and benefit from preventative measures and the improvement of policing and prosecution because these are the areas that rape victims deal with before and after their assaults. Under the Act, when rapes occur, American Indian and Alaska Native women can expect only slightly increased prosecution of their cases, but they will receive more thorough investigation and medical care.

Preventative measures most likely will not deter those who rape American Indian and Alaska Native women because the prevention education is aimed at American Indian and Alaska Native men, who commit a small portion of these rapes perpetrated each year. However, increased public awareness and public disdain for the behavior of raping American Indian and Alaska Native women may have some effect and aid in preventing the cycle of non-Native men raping Native women.

With the projected training and increased cooperation between the law enforcement agencies, American Indian and Alaska Native women can most likely expect more thorough and professional investigations into their allegations of rape and sexual assault. Women can expect more formalized and predictable investigations, including access to rape kits at medical facilities. With better investigations, it is likely that fewer cases will be denied based on a purported lack of evidence. However, the legislation does not provide for extra manpower on rural reservations. Therefore, many crimes will continue to go uninvestigated.

The Tribal Law and Order Act's empowerment of federal agencies does not make sense. The Tribal Law and Order Act gives even more investigative power to the federal government, which, as shown through the current problems, has ignored its duty to American Indian and Alaska Native women.¹⁶⁰ The Act does expand the federal resources available to prosecute Indian Country crimes. However, this is not the first time that the federal government has pledged more resources to tribes. In 2002, the federal government dedicated more agents and resources to policing Indian Country, but redirected those resources to Homeland Security after the

¹⁵⁸ Tribal Law and Order Act, § 251.

¹⁵⁹ Tribal Law and Order Act, § 231.

¹⁶⁰ See discussion *supra* Part II.

September 11th attacks.¹⁶¹ Giving more power to the entity that has committed a gross dereliction of its duties year after year for more than a hundred years defies logic, especially given that, historically, extra federal personnel have been dedicated to Indian Country, then later redirected.

On the front of prosecution, American Indian and Alaska Native women face a tough road despite the Tribal Law and Order Act. The Act does nothing to fix or clarify the jurisdictional maze. “Jurisdictional distinctions based on the race or ethnicity of the accused . . . have the effect in many cases of depriving victims of access to justice”¹⁶² and will most likely continue to do the same under the Tribal Law and Order Act. The Act simply adds another layer of jurisdictional confusion by allowing public law states to opt in to concurrent state, federal, and (possibly) tribal jurisdiction.¹⁶³ Subtitle B makes it an option for three different jurisdictions to be concurrently responsible for the crimes occurring in Indian Country.¹⁶⁴

Adding another layer exacerbates the confusion and will result in less accountability for agencies. The jurisdictional system is already overly complex. Subtitle B, by giving concurrent jurisdiction to federal courts over public law states,¹⁶⁵ further complicates the matter. While seeking to clarify the jurisdictional maze, the federal government has added more confusion by forcing victims to make the determination of whether federal, state, or tribal authorities have jurisdiction, rather than just a determination between two jurisdictions.

The Tribal Law and Order Act also creates even more bureaucracy through new agencies and new officers, and therefore it adds to the jurisdictional maze that already causes problems and confusion amongst organizations and, worse, amongst American Indian and Alaska Native victims of rape and sexual assault. Although adding more personnel is arguably a step in the right direction, it does nothing to clear up the confusion of who should act and when. Instead of simplifying the roles of agencies involved, the Tribal Law and Order Act seeks to solve the problem with more people.

We have already seen how, in the words of journalist Michael Riley, “a system with overlapping opportunities for intervention can also fail multiple times.”¹⁶⁶ But the Tribal Law and Order Act compounds this problem, rather than diminishing it. More people, with no consequential

¹⁶¹ *Bill Moyers Journal*, *supra* note 98.

¹⁶² *See* AMNESTY INT’L, *supra* note 18, at 30.

¹⁶³ *See* Tribal Law and Order Act, §§ 221–222.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See* Riley, *supra* note 1.

mechanism for increased accountability, will not improve the justice system available to American Indian and Alaska Native rape victims.

The legislation also fails to meaningfully address the federal prosecutors' declination rate for prosecuting rapes of American Indian and Alaska Native women. With increased training and more thorough investigations, it seems to be Congress's hope that fewer cases will be dismissed, and therefore more rapists and other perpetrators will be brought to justice. However, the legislation does not and arguably cannot combat federal prosecutors refusing to prosecute rapes and sexual assault from Indian Country because they "didn't sign up for this" or would prefer higher profile cases.

Although the introduction of a dedicated Assistant United States Attorney will likely have some effect on prosecutions, American Indian and Alaska Native women will most likely still be deprived of justice due to the declination of prosecution by United States Attorneys. The Act simply requires those United States Attorneys to give notice of their decisions not to prosecute and offers no incentive or plan to guarantee more prosecutions or valid declinations. Increased resources and attention focused on the problems of prosecuting rapes in Indian Country may compel more zealous prosecution by federal and state actors, but it is not the best solution. Tribes still maintain the greatest interest in prosecuting these cases. A piece of legislation cannot ensure vigor of prosecution, and in the case of the Tribal Law and Order Act, it does not even attempt to curtail prosecutors from declining to prosecute low-profile cases discriminatorily.

The Tribal Law and Order Act will have little impact on the lives of American Indian and Alaska Native rape victims in the areas of prevention, policing, and prosecution. Scholars studying the issues have noted that the [United States] government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence by underfunding tribal justice systems, prohibiting tribal courts from trying non-Indian suspects and limiting the custodial sentences which tribal courts can impose for any one offence.¹⁶⁷

The Tribal Law and Order Act offers more of the same interference. More hoops, less sovereignty, and more headaches from its imposed bureaucracy constitute the real effects of the Act's provisions empowering the federal government.

The legislation falls far short of achieving its stated goals. Even if the legislation is considered merely a step in the right direction towards achieving these goals, the Tribal Law and Order Act takes several missteps towards solving the problems facing American Indian and Alaska Native

¹⁶⁷ AMNESTY INT'L, *supra* note 18, at 6–8.

rape victims and arguably is going in the wrong direction from the desired end result.

IV. SUGGESTED CHANGES TO THE LEGISLATION

The legislation fails in its general approach to the problems facing American Indian and Alaska Native rape victims and the tribal governments that seek to protect them. It also fails to address serious problems in the system. The Tribal Law and Order Act does not seek to meaningfully empower tribal authorities and does not respect tribal sovereignty, despite the fact that the Act states these goals and the idea of empowering tribes to handle justice has long been espoused as ideal.¹⁶⁸ In 1995, Attorney General Janet Reno acknowledged the importance of empowering tribal judicial systems:

While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement in tribal justice systems as well.¹⁶⁹

In a general sense, the legislation is inherently flawed in that it seeks to solve the problem by placing more control with federal and state governments.¹⁷⁰

Additionally and more specifically, the Tribal Law and Order Act does little to make the situation better for American Indian and Alaska Native victims of rape and sexual assault. For example, Subtitle B is basically a game of choose-your-own-conqueror for tribal authorities: tribes in public law states are given the choice between allowing the state to maintain jurisdiction or giving jurisdiction to a federal government that has long neglected its duties to American Indian and Alaska Native rape victims. There is no provision for tribes to elect for exclusive jurisdiction; the choice provided is between partnering with state authorities, federal authorities, or

¹⁶⁸ "[One] purpose[] of this title [is] . . . to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country . . ." Tribal Law and Order Act, § 202(b)(3).

¹⁶⁹ Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995), available at <http://www.tribal-institute.org/articles/reno.htm> (footnote omitted).

¹⁷⁰ See, e.g., Tribal Law and Order Act, §§ 211, 213–214, 221–222 (authorizing federal jurisdiction in public law states); § 234(a) (increasing the custodial sentencing cap to three years of incarceration, a \$5,000–\$15,000 fine, or both, and therefore continuing the "moot[ing]," *Oliphant v. Suquamish*, 435 U.S. 191, 203 n.14 (1978), of the issue of concurrent federal and tribal jurisdiction in non-public law states).

both. It's not a very meaningful choice, and it is insulting to tribal sovereignty to offer this as a solution to the problem of serious crimes going unpunished in Indian Country. In giving more power to "outside" authorities rather than vesting it back in tribal authorities, the legislation blatantly disrespects tribal sovereignty and therefore builds no bridges for increased cooperation (another enumerated goal of the legislation).¹⁷¹

In light of expected continuing problems, the federal government should adopt further changes to the Tribal Law and Order Act that will move towards bringing justice to American Indian and Alaska Native rape victims. The most beneficial modifications to the Act would be to adopt concurrent jurisdiction over American Indian and Alaska Native perpetrators, remove custodial sentencing caps to allow tribes to punish their members, and provide federal funding for tribes to further develop and update their judicial systems.

Adopting concurrent jurisdiction between federal and tribal authorities for major crimes, such as rape, committed by tribal members and concurrent jurisdiction with either federal or state authorities (not both) in public law states would recognize tribal sovereignty and empower tribes to take action to protect American Indian and Alaska Native women. With this concurrent jurisdiction, it is also necessary to remove the limits on tribal courts' ability to punish their own members proportionally for their crimes, and to fund the judicial system appropriately.

Adopting these three changes would avoid all too common occurrences of tribal offenders getting off as easily as Ronnie Tom just because a federal prosecutor declined to try the case. Restoring tribal authority to prosecute and punish for serious crimes could greatly affect the prevention, policing, and prosecution of rapes and sexual assaults in Indian Country, but would also serve the higher purpose of mending relationships between federal and tribal authorities and would facilitate cooperation to combat sexual violence and other crimes.

It is important to remember that the rape of American Indian and Alaska Native women is not a new phenomenon, but that "the United States was founded, in part, through the use of sexual violence as a tool, that were it not for the widespread rape of Native American women, many of our towns, countries, and states might not exist Thus, critical to contemporary anti-rape dialogues is the inclusion of historical analysis of colonization"¹⁷² and an attempt to heal this relationship.

¹⁷¹ "[One] purpose[] of this title [is] . . . "to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies" § 202(b)(2).

¹⁷² Deer, *supra* note 13, at 459.

The federal government has a responsibility to ensure that women are able to enjoy their right to freedom from sexual violence throughout the United States—including in Indian Country.¹⁷³ The federal government has promised to protect American Indian and Alaska Native women,¹⁷⁴ but tribal authorities also share this interest and should, therefore, be allowed to share in the responsibility. “As citizens of particular tribal nations, the welfare and safety of American Indian and Alaska Native women are directly linked to the authority and capacity of their nations to address such violence,”¹⁷⁵ in part because of the failures of the federal government and in part because tribal authorities are better suited to deal with rape and sexual assault.¹⁷⁶

The biggest issue is that American Indian and Alaska Native women suffer the highest rate of sexual assault in the United States—a form of violence that was once used as a weapon of war and colonization against them. Stripping contemporary tribal governments of the ability to prosecute many sex offenders and to defend their citizens disrespects tribal sovereignty and assigns American Indian and Alaska Native women a second-class status.¹⁷⁷ The legacy of historic abuses persists under the nose of the federal government, and American Indian and Alaska Native women continue to suffer and to be dehumanized as they have been throughout U.S. history.¹⁷⁸ This history of rape and sexual violence informs present-day attitudes, of our government and of perpetrators, that help fuel the high rates of sexual violence against American Indian and Alaska Native women and the high levels of impunity enjoyed by their attackers.¹⁷⁹

Removing sentencing caps will do nothing to solve the problem of punishing non-Native individuals convicted of rape and sexual violence perpetrated in Indian Country against tribe members (which is, admittedly, a majority of the offenses perpetrated against American Indian and Alaska Native women). This Act, if amended to eliminate caps, would restore a level of sovereignty and respect to tribal jurisdictions. “For tribal governments, defining and adjudicating crimes such as sexual assault can

¹⁷³ See AMNESTY INT’L, *supra* note 18, at 1 (explaining accepted standards of human rights guarantees by sovereign nations, including the United States).

¹⁷⁴ See Major Crimes Act, 18 U.S.C. § 1153 (2006); Tribal Law and Order Act.

¹⁷⁵ AMNESTY INT’L, *supra* note 18, at 1.

¹⁷⁶ *Id.* at 30 (“Tribal courts are the most appropriate forums for adjudicating cases that arise on tribal land, and . . . state and federal authorities often do not prosecute those cases of sexual violence that arise on tribal land and fall within their exclusive jurisdiction.”).

¹⁷⁷ Deer, *supra* note 13, at 455.

¹⁷⁸ See AMNESTY INT’L, *supra* note 18, at 17.

¹⁷⁹ *Id.*

be the purest exercise of sovereignty. What crime, other than murder, strikes at the hearts of its citizens more deeply than rape?"¹⁸⁰

In a history that has been plagued first by conquest, then by trickery, and now by paternalism, returning the power to punish would go a long way in building partnership and trust.

V. CONCLUSION

The Tribal Law and Order Act was written with American Indian and Alaska Native victims in mind. Therefore, the most important perspective in analyzing the legislation's effectiveness is the victim's. If the Act had been in effect in 2003 when Ronnie Tom attempted to rape a twelve-year-old and did rape a seven-year-old, what would be different for the victims? The answer, sadly, is not much.

The legislation cannot force police and prosecutors to care about the abuses and hardships faced by American Indian and Alaska Native women because the Act cannot create an interest where one does not exist. The new legislation would produce little to no practical difference: Tom would serve up to six years¹⁸¹ instead of two.

The only way to achieve justice, fairness, and consistent outcomes is to put more trust in tribal governments, and to allow those with an interest to make headway against the dire situation of American Indian and Alaska Native women. Tribal courts are the most appropriate forum to try cases against American Indian and Alaska Native perpetrators and they should be empowered to do so with concurrent jurisdiction and authority to impose sentences proportional to the crime.

¹⁸⁰ Deer, *supra* note 13, at 465.

¹⁸¹ Ronnie Tom received two years based on stacked sentences of one year for each crime: the range reflects the maximum Tom would receive (two three-year sentences) and the minimum he would likely receive (one three-year sentence). 18 U.S.C. § 1153 (2006).